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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MARK ROBINSON, Plaintiff and Appellant, v. RITZ-CARLTON HOTEL COMPANY, LLC, Defendant and Respondent.	A150239 (San Francisco County Super. Ct. No. CGC15546585)

When a person engages the Ritz-Carlton Hotel (Ritz-Carlton) to provide a banquet facility and attendant services, the Ritz-Carlton imposes a mandatory "service charge" on the amount charged for the event. Some, but not all, of the "service charge" is distributed by Ritz-Carlton to employees who work at the banquet. Former employee Mark Robinson sued Ritz-Carlton, alleging that the "service charge" met the Labor Code[1] definition of "gratuity," that by law should be distributed entirely, and exclusively, to employees.

At the short bench trial, Ritz-Carlton maintained that *Searle v. Windham International, Inc*. (2002) 102 Cal.App.4th 1327 (*Searle*) and *Garcia v. Four Points Sheraton LAX* (2010) 188 Cal.App.4th 364, 377 (*Garcia*) establish that a "service charge" was categorically distinct from a "gratuity" and could never be a gratuity. The trial court rejected this argument, and ultimately concluded that Robinson failed to prove

[1] Statutory references are to the Labor Code unless otherwise indicated.

his case according to his trial theory as presented at the start of the trial. We conclude Robinson's contentions are without merit. Accordingly, we affirm the judgment.

BACKGROUND

Pre-Trial

The gist of Robinson's short complaint is summarized in its introduction: "This is a class action brought under California law challenging the defendant's failure to remit the total proceeds of gratuities that have been added to banquet bills to the non-managerial employees who provide service of food and beverage in the hotel's banquet department. As set forth below, Defendant Ritz-Carlton Hotel Company . . . has imposed gratuities on the sale of food and beverages at banquets held in its hotel . . . but it has failed to distribute the total proceeds of these gratuities to non-managerial food and beverage banquet service employees as required by California law. This conduct violates the California Gratuities Law, California Labor Code § 351, which is enforceable through the California Unfair Competition Law, Cal. Bus. & Prof. Code, § 172000 *et seq*."

The "as set forth below" sketches the outline of Robinson's claim:

"At the Ritz-Carlton . . ., Defendant has routinely added gratuities to its food and beverage banquet bills.

"These gratuities have been in the form of automatic charges which customers are required to pay, and which reasonably appear to be gratuities for the service staff.

"It is typical and customary in the hospitality industry that establishments impose gratuity charges in the range of 18-22% of the food and beverage bill.

"Thus, when customers pay these charges, it is reasonable for them to believe they were gratuities to be paid to the service staff.

"Indeed, because of the way these charges are depicted to customers, and the custom in the food and beverage industry that gratuities in the range of 18-22% are paid for food and beverage service, customers have paid these charges reasonably believing they were to be remitted to the service staff.

"However, the defendant has not remitted the total proceeds of these gratuities to the non-managerial employees who serve the food and beverages.

"Instead, the defendant has had a policy and practice of retaining for itself a portion of these gratuities and/or using a portion of these gratuities to pay managers or other non-service employees."

Based on these allegations, Robinson stated causes of action for (1) Statutory Gratuity Violation ("Defendant's conduct . . . constitutes a violation of . . . § 351"); (2) Intentional Interference with Advantageous Relations; (3) Breach of Contract; and (4) Unjust Enrichment.

The cause was assigned to the Complex Civil Ligation Department. After receiving the parties' joint case management statement, and with their agreement, the trial court scheduled a one-day trial to "answer the question whether defendant Ritz-Carlton . . . violated . . . § 351 with respect to plaintiff Mark Robinson."

The parties filed a Joint Stipulation of Facts, among which was this information: "Defendant distributes 16.5% out of the 24% service charge to Banquet Servers. . . . [¶] Defendant retains 4.5% out of the 24% service charge for itself as revenue, and it distributes 1% to the Banquet Captains. These are the portions of the Food and Beverage Service Charge that Plaintiff is seeking to recover in this case."

"Banquet Servers are non-exempt employees who are paid an hourly wage in addition to sharing in a pool of the portion of the Food and Beverage Service Charge that is distributed to Banquet Servers."

"Banquet Captains do not hire or fire Banquet Servers. Banquet Captains are paid as non-exempt employees and also receive a portion of the Food and Beverage Service Charge that is distributed to the captains. Like the Banquet Servers, the captains' portion of the service charge is calculated weekly, based on hours worked."

The Joint Stipulation also included "additional facts that are undisputed, but that the parties disagree are either material or relevant." Among the "Additional Undisputed Facts Submitted by Defendant" was this break-down of the distribution of the service charge:

"Since June 2011, the distribution of the Service Charge has been as follows

"a. Banquet Servers have received 68.75% of the Food and Beverage Service Charge. This equates to approximately 16.5% of the pre-tax amount spent by banquet customers on food and beverage for their banquet event.

"b. Banquet Housemen[2] have received 8.3% of the Food and Beverage Service Charge. This equates to approximately 2% of the pre-tax amount spent by banquet customers on food and beverage for their banquet event.

"c. Since their position was re-introduced in approximately November 2012 and the Service Charge was increased from 23% to 24%, Banquet Captains[3] have received 4.2% of the Food and Beverage Service Charge. This equates to approximately 1% of the pre-tax amount spent by banquet customers on food and beverage for their banquet event.

"d. The Hotel has retained 18.75% of the Food and Beverage Service Charge. This equates to approximately 4.5% of the pre-tax food and beverage costs for each banquet event. This portion is retained as revenue for the Hotel and is not distributed to any manager or employee."

The parties submitted trial briefs demonstrating their irreconcilable views of whether Ritz-Carlton's service charge was, or could ever be, a gratuity. For Robinson, "A Mandatory Service Charge is a Gratuity Under . . . § 351" because that is how a reasonable banquet client would perceive it. By contrast, Ritz-Carlton maintained that "Plaintiff's arguments depend entirely on the misplaced notion that the Food and Beverage Service Charge is a 'gratuity' for purposes of . . . section 351. But California law is clear that 'a service charge by definition is *not* a gratuity.' "

The Trial

Proceedings began with the trial court being provided the preagreed exhibits and a revised Joint Stipulation of Facts. Both sides agreed that only "the statutory claim" was

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[2] "Banquet Housemen's primary responsibility is to set up and tear down tables and chairs for banquet events."

[3] "Banquet Captains . . . act as the liaisons between the customer holding the event and Banquet Servers during [the] event."

at issue and that the court would be required to decide a single issue of law—whether, in the words of Robinson's counsel, Ritz-Carlton's mandatory service charges "come under the coverage of . . . section 351 and can constitute gratuities."

The court heard extensive opening statements from counsel. (So extensive, that their remarks constitute one-third of the reporter's transcript.)

In her opening statement, counsel for Robinson told the court the evidence, and Ritz-Carlton's own internal documents, would show that "at hotels where . . . these big banquets . . . are held, there are . . . these huge bills for food and beverage. And hotels routinely throughout the industry tack on a service charge, and this is the gratuity. People in the food and beverage industry understand that this is the gratuity." However, counsel also stated: "I don't think any of the evidence you're going to be hearing today is actually material to your decision," and "both sides have agreed that actual customer testimony, what's actually in their head, is not really what's at issue here."

Counsel for Ritz-Carlton responded in his opening remarks that "we actually do not disagree with plaintiff's counsel that testimony is probably, in our view, unnecessary based on . . . the stipulated facts"; "I . . . don't think it's relevant at all" because the court was being asked to decide a pure issue of law, and "Your Honor can decide this issue based purely on . . . what's in the joint stipulated facts." However, he did note that "there is no custom and practice of tipping in the banquet industry."

The trial court heard brief testimony—which is not truly germane to this appeal—from Robinson and Ritz-Carlton's special events manager. It is sufficient for present purposes to note that the testimony covered little that was not already in the revised Joint Stipulation of Facts. The trial ended with the court agreeing to provide a proposed statement of decision.

When it did so, the trial court concluded that although the service charge vs. gratuity distinction pressed by Ritz-Carlton was unsound, Ritz-Carlton would nevertheless prevail because Robinson's strategy was premised upon the existence of a custom for "the entirety of the 'food and beverage industry' " that treated a service

charge as a gratuity for the employed staff at banquets, and Robinson had failed to present evidence "of such custom." The trial court summarized:

"In short, to prevail in this sort of case plaintiffs must prove a custom or general practice of tipping, in the sense that customers intend for an identifiable sum to be provided directly to the server. If the[] customers in those situations do not leave tips because it reasonably appears to them that some other sum collected by the employer is designed to cover the tip, at least some part of that other sum may well be a § 350 tip.

"Here, there is insufficient evidence that there is any custom, practice or understanding that banquet servers are tipped. There is no deal [between banquet client and staff] to protect here. I thus intend to enter judgment for defendant the Ritz-Carlton and against plaintiff Robinson."

Robinson protested vigorously in his written opposition to the proposed statement of decision: "Plaintiff has argued that this case simply presents a purely legal question of statutory interpretation. Because the parties were in general agreement on this point, but they adopted the Court's suggestion that they proceed directly to a bench trial, rather than engaging in summary judgment motion practice so as to proceed more speedily to an adjudication of this case, Plaintiff did not know, nor was he able to anticipate, that the Court would rest its decision on the factual existence or non-existence of a 'custom of tipping' in the hotel banquet industry. . . . Plaintiff believed this to be an issue that the Court could judicially notice, or determine based upon the facts presented in the record of this trial, but if the Court believes that more general factual evidence of such custom is necessary for Plaintiff to meet his burden, then Plaintiff requests that he be permitted to present evidence on this issue."

After hearing unreported argument, and declining to reopen the case, the court filed its final statement of decision and entered judgment for Ritz-Carlton.

DISCUSSION

The Relevant Statutes

" 'Gratuity' includes any tip, gratuity, money, or part thereof that has been paid or given to or left for an employee by a patron of a business over and above the actual

amount due the business for services rendered or for food, drink, or articles sold or served to the patron." (§ 350, subd. (e).)

"No employer or agent[4] shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for." (§ 351.)

The purpose of section 351 "is to prevent fraud upon the public in connection with the practice of tipping and . . . cannot be contravened by a private agreement."[5] (§ 356.)

Searle and Garcia

Respondent argued in the superior court that *Searle* and *Garcia* hold that a mandatory service charge "cannot by definition be a gratuity," and that Robinson's claims could be disposed of on that basis alone. The trial court disagreed, distinguished those cases, and went on to address Robinson's claim on the merits.

Respondent has not filed a cross-appeal, and because we affirm the trial court's judgment, we do not need to decide this issue in order to determine this appeal.

We note that we do not disagree with the trial court's conclusion that neither case is dispositive. *Searle* involved the Wyndham hotel in San Diego imposing a mandatory service charge of 17 percent on every room service order. The bill presented with each room service order set out the amount of the order itself; the 17 percent service charge; a $3 "room delivery charge"; and "a blank line for a tip or gratuity." Searle, a patron of the

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[4] " 'Agent' means every person other than the employer having the authority to hire or discharge any employee or supervise, direct, or control the acts of employees." (§ 350, subd. (d).)

[5] Among the historic "frauds" the Legislative had in mind were employers simply appropriating tips meant for employees, or requiring the employee to remit/share a portion to the employer, or using the amount of the tips in computing an employee's wages. (See, e.g., *Henning v. Industrial Welfare Com.* (1988) 46 Cal.3d 1262, 1275, 1278-1279.)

hotel, brought suit, which fell to a general demurrer. As summarized by the Court of Appeal: "According to Searle, the hotel's room service billing practice is deceptive because guests are not advised the service charge is in fact a gratuity paid to the server. Searle also contends the service charge is unfair because it compels guests to pay a gratuity, which Searle believes should be entirely voluntary. Thus, Searle allege[d] the hotel's room service practices violate the unfair competition law (UCL)." (*Searle, supra,* 102 Cal.App.4th at pp. 1330-1331.)

Section 351 does not feature prominently in Seale.[6] The Court of Appeal describes section 351 as codifying state policy that " 'ensure[s] that employees, not employers, receive the full benefit of gratuities that patrons intend for the sole benefit of those employees who serve them.' " (*Searle, supra,* 102 Cal.App.4th at p. 1332, quoting *Leighton v. Old Heidelberg, Ltd*. (1990) 219 Cal.App.3d 1062, 1068.)

True, Searle does involve a mandatory "service charge" imposed in the context of selling food and drink to the public. But there are crucial distinguishing features that prevent it from being controlling precedent. The purpose of section 351 being to ensure that all of a tip goes to the employee, there was no problem when the hotel's practice was "alleged to cause servers to receive more in the way of tips" than the person ordering room service may have intended; this practice did not "violate the spirit or letter" of the statute. (*Searle, supra,* 102 Cal.App.4th at pp. 1333-1334). This of course is precisely the opposite of what Robinson is alleging in the case before us.

Ritz-Carlton naturally seizes upon a statement in *Searle* that, "Because the service charge is mandatory and because the hotel is free to do with the charge as it pleases, the service charge is simply not a gratuity which is subject to the discretion of the individual patron." (*Searle, supra,* 102 Cal.App.4th at p. 1335.) The trial court concluded that this statement is dictum because the decision in *Searle* was that the UCL did not require the

[6] The Court of Appeal wrote, "Searle has not cited any law which Wyndham's room service practice violates. Indeed, other than Labor Code section 351, we are not aware of any express regulation of tipping on room service billing." (*Searle, supra,* 102 Cal.App.4th at p. 1333.)

hotel to "advise its guests as to how it compensates its employees" (*id.* at p. 1335), a holding that was not dependent on a finding that the service charge was or was not a gratuity under section 351. Whether it is dictum (a point debated by the parties) is not significant. What is important is that *Searle* dealt with charges that the hotel employer intended to function as gratuities. For the hotel's internal purposes, the mandatory service charge was the equivalent of a gratuity; it certainly was the source of what was eventually distributed to the employees who took the room service order to the hotel guest's room. Ritz-Carlton fails to appreciate that the underlying facts in *Searle* show a service charge being treated by the employer as a gratuity. The voluntary nature of a gratuity discussed in *Searle* is thus incompatible with the actual result in Searle, namely allowing a mandatory gratuity to stand.

The plaintiffs in *Garcia* were service workers employed by hotels in Los Angeles. A city ordinance directed hotel employers to treat mandatory service charges as owed "to workers who render the services for which the charges have been collected."[7] (*Garcia,*

[7] Quoting parts of the ordinance, the *Garcia* court described its terms thusly: "The operative provisions of the Ordinance are codified in sections 184.00 through 184.06 of the Los Angeles Municipal Code. [Citation.] Section 184.02 states in pertinent part: 'Service Charges shall not be retained by the Hotel Employer but shall be paid in the entirety by the Hotel Employer to the Hotel Worker(s) performing services for the customers from whom the Service Charges are collected.' [Citation.] Service charges may not be paid to 'supervisory or managerial employees,' and must be paid to 'Hotel Worker(s) equitably and according to the services that are or appear to be related to the description of the amounts given by the hotel to the customers.' [Citation.] Service charges collected for banquets or catered meetings 'shall be paid equally to the Hotel Workers who actually work the banquet or catered meeting'; service charges collected for room service 'shall be paid to the Hotel Workers who actually deliver the food and beverage associated with the charge'; and service charges collected for porterage services 'shall be paid to the Hotel Workers who actually carry the baggage associated with the charge.' [Citation.] Gratuities and tips left by customers for a hotel worker are excluded. [Citation.] [¶] A 'service charge' is defined in the Ordinance as 'all separately-designated amounts collected by a Hotel Employer from customers that are for service by Hotel Workers, or are described in such a way that customers might reasonably believe that the amounts are for those services, including but not limited to those charges designated on receipts under the term "service charge," "delivery charge," or "porterage charge." ' [Citation.]" (*Garcia, supra,* 188 Cal.App.4th at pp. 375–376, fns. omitted.)

supra, 188 Cal.App.4th at p. 370.) The Court of Appeal rejected the hotels' contention that the ordinance was preempted by section 351, writing that "a service charge by definition is not a gratuity," and describing it as a "separately designated amount collected by a hotel from patrons that is part of the amount due the hotel for services rendered, rather than something 'over and above the amount due.' " (*Id*. at p. 377.)

Again, there are crucial distinguishing features in *Garcia*. The trial court here found, and we do not disagree, that the *Garcia* court's determination that the local ordinance was not preempted did not depend upon the conclusion that service charges are not gratuities. The defendants in *Garcia* argued that there was a conflict between the two statutes, and the local ordinance was preempted, because the definition of gratuity in section 350 "excludes *employers'* property (service charges)." (*Garcia, supra,* 188 Cal.App.4th at p. 377, emphasis added.) The Court of Appeal fundamentally disagreed. "The definition of gratuity in section 350, subdivision (e) does not define employers' property rights; it establishes the meaning of 'gratuity' as that term appears elsewhere in the statute." Thus under the terms of section 351, an employer is prohibited from taking any part of a gratuity, because " '[e]very gratuity is hereby declared to be the sole property of the employee or employees . . . .' " (*Id.* at p. 378.) But the Court of Appeal was unequivocal that "We do not read section 351 or any other provision in the Labor Code governing gratuities to address employers' property rights," nor did any extrinsic materials supplied by the defendants support that argument. (*Id*. at p. 378.) The Labor Code and the local ordinance "address different subjects and attempt to prevent different harms." (*Id*. at p. 379.) "The Labor Code attempts to prevent fraud on the public in connection with the practice of tipping to ensure employees receive the tips left for them by the patron," whereas the ordinance addresses "certain hotels' business practices of pricing services based upon two components—a base price and a surcharge, designated as a 'service charge.' " (*Ibid*.)

The Garcia court went on that the ordinance "does not prevent hotels from charging patrons for services, but it recognizes that the 15 to 20 percent service charge misleads the public into assuming that the service charge is being distributed to the

worker performing the services." (*Garcia, supra,* 188 Cal.App.4th at p. 379.) In finding no conflict between the statute and the ordinance, the *Garcia* court concludes, "Thus, the Ordinance does not prohibit what the Labor Code commands or command what it prohibits." (*Ibid*.)

Robinson's Contentions

As already mentioned, at trial Robinson relied on the "reasonable customer expectation" test developed by several other states, which would treat as a gratuity any charge, however labeled, that a customer would reasonably believe to be a gratuity for service employees. The trial court mentioned this theory in its decision but took no definitive position on it. Although references to customer expectations permeate Robinson's briefs, he does not formally frame the issue[8] and seek to have it addressed on appeal. We therefore move to the arguments he does present.

All but one of Robinson's arguments center around the trial court's conclusion that Robinson had failed to prove the existence of an industry-wide custom of treating banquet service charges as akin to a restaurant tipping pool that would be distributed to employees.[9] Robinson tells us he "had no advance notice that this would be the question the Court would focus on," and thus no inkling that "he would need to provide evidence in support of this self-evident fact." In addition, "it was unclear what type of evidence the Superior Court had expected to see presented on this question." Robinson believes the banquet industry custom of equating service charges with employee gratuities is so "self-evident" that the trial court ought to have taken judicial notice of it, even in the absence of a request from a party to do so. Next Robinson argues the trial court "erred by refusing to allow plaintiff to supplement the record when he was not previously aware of

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[8] California Rules of Court, rule 8.204(a)(1)(B) directs that every "brief must: . . . [¶] . . . [¶] State each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority."

[9] An employer is permitted to establish a pool for all tips, and to determine how it will be distributed among employees. (E.g., *Avidor v. Sutter's Place, Inc*. (2013) 212 Cal.App.4th 1439, 1448-1450; *Etheridge v. Reins Internat. California, Inc*. (2009) 172 Cal.App.4th 908, 918-920.)

the evidentiary burden to which he would be held"; in other words, that he should have been permitted to reopen the case. Robinson asserts that "to the extent the Superior Court found that it had to make a factual determination regarding tipping customs in the banquet industry, it failed to account for and afford sufficient weight to plaintiff's evidence."

Most of these arguments are based on a misreading of the record.

We have already quoted the allegation in Robinson's complaint concerning "custom in the food and beverage" and "hospitality" industries. Moreover, at the start of the trial, counsel for Robinson told the court:

"For large parties in restaurants, it's not uncommon for . . . restaurants to tack on the gratuity, you know, to ensure that the servers are going to get a gratuity because as the prices go up, customers tend to get a little more stingy, so it ensures that they get the benefit of a gratuity.

"The same thing happens at hotels where there are these big banquets that are held, there are weddings, there are anniversary parties, there are conferences. There are these huge bills for food and beverage. And hotels routinely *throughout the industry* tack on a service charge, and that is the gratuity. People in *the food and beverage industry* understand that this is the gratuity. . . .

"And this is pretty common *in the industry*." (Italics added.)

"[T]he reason they do that is pretty well-known *through the industry*. It's because customers are willing to—on top of these really high prices, are willing to pay a little more because it looks like it's the gratuity, and customers understand and are used to paying gratuities *in the food and beverage industry*." (Italics added.)

And counsel for Ritz-Carlton responded: "The other thing that is a factual dispute—and I don't think, again, really think it's particularly relevant, but since [Robinson's counsel] addressed it in her opening, I want to address it as well. She talks about the custom of tipping in the food and beverage industry like the food and beverage industry is this . . . monolithic entity where everything is the same. The reality is . . . that

the restaurant industry is very different than the food and beverage service charge that's applied in the banquet industry."

"[I]t's the plaintiff's burden to prove their [*sic*] claim here. It's not my burden to disprove it. The reality is . . . that there is no custom and practice of tipping in the banquet industry."

Banquet industry custom was not a surprise that the trial court sprang on the parties. It was a contested issue of fact (*Cox v. Pithoud* (1963) 221 Cal.App.2d 571, 574; *A.T. & T. Oil Co. v. Interstate Oil Corp*. (1931) 114 Cal.App. 692, 696) raised by Robinson, and thus his to prove. (Evid. Code, § 500; *Sharpe v. Arabian American Oil Co*. (1952) 111 Cal.App.2d 99, 105.) Custom was an integral part of Robinson's case. It is therefore puzzling—and incorrect—to hear Robinson saying he had no notice of the issue.

As for "what type of evidence the Superior Court had expected to see presented on this question," it clearly expected evidence of some kind. The trial court concluded "there is (a) no evidence of any customary tipping, nor (it follows) of any understanding that the service charge is in lieu of tips, and (b) only a few anecdotal instances of communications that might suggest such an understanding. This is weak evidence and does not satisfy plaintiff's burden of proof." Words such as "weak" and "anecdotal" clearly indicate the trial court was weighing Robinson's evidence. This court is not permitted to reweigh that evidence. (E.g., *In re I. J*. (2013) 56 Cal.4th 766, 773; *Hasson v. Ford Motor Co*. (1977) 19 Cal.3d 540, 544; *World Business Academy v. State Lands Com.* (2018) 24 Cal.App.5th 476, 499.) Robinson's argument that the trial court failed to "afford sufficient weight" to his evidence fails accordingly.

We further note that overturning the trial court's determination that Robinson had failed to sustain his burden of proof would be a daunting task. " '[W]here the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no

room for a judicial determination that it was insufficient to support a finding." ' " (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc*. (2011) 196 Cal.App.4th 456, 466.) There is no possibility, on this record, that Robinson can satisfy this test.

As for judicial notice, there are distinct procedures before it occurs. (See Evid. Code, §§ 452-456; Cal. Rules of Court, rule 3.1306(c); Super. Ct. S.F. County, Local Rules, rule 8.6.) As noted already, Robinson raised the possibility that the trial court "could" take judicial notice, but Robinson did not make an actual request in a recognized form. The subject of banquet industry custom was not one where the court was required to take judicial notice. Robinson cites no decision holding it was reversible error for a trial judge not to take permissive judicial notice on its own initiative. The situation presented is thus covered by the established principle that a judgment will not be reversed on appeal because of the failure of the lower court to do something it was never asked to do. (E.g., *People v. Lilienthal* (1978) 22 Cal.3d 891, 896; *Buck v. Canty* (1912) 162 Cal. 226, 238; *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 309.)

As for permitting or denying Robinson to "supplement" or reopen his case for further evidence, that decision was committed to the trial court's discretion, and we could reverse only if we conclude it abused that discretion by rendering a decision that exceeded the bounds of reason. (*Grunewald-Marx, Inc. v. L. A. Joint Bd*. (1959) 52 Cal.2d 568, 587; *Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 208-209.) "A motion to reopen . . . can be granted only on a showing of good cause." (*Sanchez v. Bay General Hospital* (1981) 116 Cal.App.3d 776, 793.) The moving party's diligence (or lack thereof) in presenting the new evidence, as well as the significance of the evidence are factors for consideration. (*People v. Homick* (2012) 55 Cal.4th 816, 881.)

The "evidence" Robinson wanted to present consisted of (1) a number of letters addressed to the Legislature concerning the impact of a proposed amendment to section 351; (2) an analysis of the bill (Assembly Bill No. 10) by the Senate Committee on Industrial Relations; (3) a single-page with what appear to be handwritten comments and descriptions by the bill's author; (4) a letter from the Legislative Counsel to the Speaker of the Assembly answering a question as to the bill's likely impact on existing collective

bargaining agreements specifying the allocation of "banquet gratuities"; and (as exhibits to Robinson's objections to the proposed statement of decision) (5) materials from Hawaii and New York dealing with their gratuity statutes.

Concerning (1) through (4), Robinson argues these materials "showed that in 1973, the [L]egislature, hotel operators, and hotel employees all understood that tipping was a customary and widespread practice in the hotel banquet industry (like in the restaurant industry), and they all understood that the legislation being debated would affect employees in the hotel industry, particularly banquet servers."

It is true that the bill was eventually enacted (Stats. 1973, ch. 879), but Robinson presented only a portion of a proper legislative history. Although it may be hazardous to risk an assessment, it appears from the bill analysis that the purpose was to prevent employers from using customer tips to meet minimum wage requirements for employees. It is fortunate for present purposes that such was the conclusion of our Supreme Court. (*Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 600-601 ["the Legislature's ultimate goal was to prevent an employer from taking any part of an employee's gratuity by crediting an employee's tips against any wages earned"].) But the trial court heard no evidence that Ritz-Carlton was committing this forbidden practice, or that a collective bargaining agreement was being breached. Moreover, as Ritz-Carlton noted in opposition, Robinson's proffered material "is not indicative . . . of a custom or practice in the industry regarding customers' understanding of banquet service charges," which was the key point of Robinson's trial strategy. Apart from the belief that he had been "surprised" (which has already been shown to be incorrect), Robinson offered no justification for not producing the material at the trial three months before.

In light of the foregoing, we cannot conclude the trial court exceeded the bounds of reason in denying Robinson's request to reopen.

Robinson's final claim is that the trial court erred in "dismissing" his common law claims notwithstanding the failure of his section 351 cause of action. He argues that, although the trial court initially stated it would be "agnostic" on whether Robinson's common law causes of action were viable should the statutory claim be decided against

Robinson, "in its final decision, the Superior Court erroneously held that 'the parties have agreed that the resolution of [the § 351 claim] will determine all claims', including Plaintiff's common law claims. There was no such agreement, and dismissal of those claims was inappropriate. The parties did not agree to try the common law claims at the bench trial, and Plaintiff never waived his right to a jury trial on those claims. . . . However, after ruling against Plaintiff on the statutory claim, the Court simply dismissed Plaintiff's common law claims as well, ignoring Plaintiff's argument at trial that he had never agreed to submit those claims to this bench trial and did not agree that their resolution would turn on the resolution of the statutory claims."

Ritz-Carlson responds: Robinson "had multiple opportunities to raise this purported error with the Superior Court—in his Objections [to the tentative statement of decision] filed on May 12, 2016, in his Supplement in Support of Objections filed on July 5, 2016, during the [unreported] hearing held on July 12, 2016, or even after the Superior Court issued its final Statement of Decision [on July 13, 2016]—he never once brought it to the Superior Court's attention. He waited to raise this issue for the first time on appeal. Because he impliedly acquiesced to this ruling by failing to raise any objection, he has forfeited his right to attack this aspect of the judgment on appeal." (Fn. omitted.)

We agree with Ritz-Carlton. It is a bedrock principle of appellate practice that a reviewing court " 'will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not presented to the lower court by some appropriate method . . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver . . . . Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial.' " (*Doers v. Golden Gate Bridge etc. Dist*. (1979) 23 Cal.3d 180, 184-185, fn. 1 [quoting what is now 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, p. 458].) It has been applied in a situation fairly similar to the one here. (See *K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc*. (2009) 171 Cal.App.4th 939. 948-949 [plaintiff's failure

to object to procedure whereby three causes of action were dismissed at the outset of trial on preemption grounds forfeited challenge to procedure on appeal].)

The factors of acquiescence and unfairness are particularly prominent here. There was a considerable period of silence by Robinson. Had the trial court's attention been drawn to the matter, it could—with the assistance of the parties—have addressed the matter of the common law claims. Given the minimal amount of effort this would have required of Robinson, it strikes us that it would be distinctly unfair to the trial court and Ritz-Carlton if Robinson could use his inaction to obtain a reversal.

DISPOSITION

The judgment is affirmed.

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Miller, J.

We concur:

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Richman, Acting P.J.

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Stewart, J.

A150239, *Robinson v. Ritz-Carlton Hotel Company*